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In The

Supreme Court of the United States

ALBERTO R. GONZALES, U.S. Attorney General,

Petitioner,

vs.

LEROY CARHART, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF RIGHT TO LIFE ADVOCATES, INC. IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS CURIAE

Right To Life Advocates, Inc., Amicus Curiae herein ("Life Advocates"), is a nonprofit corporation organized in 1974 under the laws of the State of Texas and has a tax exempt status under § 501(c)(4) of the Internal Revenue Code. It is a pro-life advocacy organization interested in the preservation of the sanctity of human life from its commencement until natural death.[1]

All parties to this cause have consented to the filing of this Brief. The letters expressing such consent are being submitted for filing herewith.

SUMMARY OF THE ARGUMENT

I. THE COURT OF APPEALS ERRED BY APPLYING *ROE V. WADE* AND *STENBERG V. CARHART* TO THIS CASE BECAUSE *ROE* AND ITS COMPANION, *DOE V. BOLTON*, ARE VOID AS VIOLATIVE OF THE U.S. CONSTITUTION.

The Court of Appeals held the Partial-Birth Abortion Ban Act of 2003, 117 U.S. Stat. 1206-1207, Sec. 3 ("The Act"), facially unconstitutional because it lacked a maternal health exception, basing such holding upon *Stenberg v. Carhart,* 530 U.S. 914 (2000), which applied *Roe v. Wade,* 410 U.S. 113 (1973). *Carhart v. Gonzales,* 413 F. 3d 791, 803 (8th Cir., 2005).

[1] This Brief was not authored in whole or in part by any counsel for a party in this cause, and no outside person or entity made any monetary contribution toward the preparation or submission of this Brief. See this Court's Rule 37.6.

This was erroneous since *Roe* and its companion, *Doe v. Bolton,* 410 U.S. 179 (1973) (which amplified the meaning of maternal health), are void as violative of the U.S. Constitution and, hence, should not have been followed by this Court in *Stenberg.* See *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh,* 93 U.S. 274, 277-279, 283-284 (Oct. 1876). They should be reconsidered and overruled as decided wrongly. See *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 979-1002 (1992) (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., concurring in the judgment in part and dissenting in part); *Brown v. Bd. of Education of Topeka,* 347 U.S. 483, 493-495 (1954); *Erie R. v. Tompkins,* 304 U.S. 64, 77-80 (1938), overruling *Swift v. Tyson,* 16 Pet. 1 (1842).

The unconstitutionality of *Roe* and *Doe* is pervasive:

A. The Constitution, as Written, Does Not Support any Liberty of Abortion. The Constitution, as written, does not address abortion or any right to destroy human life. Instead, it *protects* the lives, etc. of persons *from* governmental deprivations without due process of law in the 5th and 14th Amendments.

In addition, one of its purposes is to extend the "Blessings of Liberty" not just to the "People" in whose name it was formulated but to their "Posterity." U.S. Const., Preamble. One such blessing is the right of Unborn Children to continue to live under the protection of applicable antiabortion law.

The *Roe* Court should have considered these matters of value and purpose before fashioning a liberty to destroy unborn human life from a Constitution which is *silent* on abortion. Any doubt as to whether the Constitution supported any such liberty should have been resolved in favor of that which *was expressed,* above.

B. The Traditions of this Nation Concerning Unborn Children Do Not Support any Liberty of Abortion. Prior to *Roe* and *Doe,* the traditions of this Nation (1) protected Unborn Children from abortion by way of the English common law and later by statutory law, e.g., I Blackstone, *Commentaries on the Laws of England* (c. 1765), pp. 129-130; *Roe,* 410 U.S. at 174-177 (Rehnquist, J., dissenting); and (2) recognized the legal status and rights posture of Unborn Children, e.g., *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,* 201 A.2d 537, 538 (S.C.N.J., 1964), *cert. denied,* 337 U.S. 985 (1965); *Crisfield v. Storr,* 36 Md. 129, 146 (Ct. App. Md., 1872).

These traditions, while discussed but not accorded proper deference by the *Roe* Court, do not support what the Court did. *Roe* departed radically from them and, in so doing, fashioned an unknown liberty which wars against them and the Constitution.

C. The Liberty Reach of the 14th Amendment Does Not Support any Liberty of Abortion. The *Roe* Court erred when it placed the privacy right inclusive of the abortion decision within the liberty reach of the 14th Amendment. While substantive due process thereunder is a broad concept, "reasoned judgment" is required for its application. *Casey,* 505 U.S. at 849.

In an effort to shown rationality, the *Roe* and *Casey* Courts placed *Roe* in succession to a line of cases dealing with procreation, marriage, etc. cited in *Roe* and amplified in *Casey.* This failed since none of the those cases dealt with the destruction of human life. *Casey,* 505 U.S. at 951-952 (Rehnquist, C.J., joined by White, J., Scalia, J., and Thomas, J., concurring in the judgment in part and

dissenting in part). Hence, the abortion decision must be viewed as *sui generis*. *Id.* at 952.

D. The Approaches Taken by this Court for the Recognition of Unenumerated Fundamental Liberties Do Not Support any Liberty of Abortion. The abortion liberty fashioned by *Roe* and amplified in *Doe* contravened the approaches taken by this Court for the recognition of fundamental unenumerated liberties. "One approach has been to limit the class of fundamental liberties to those interests that are '*implicit in the concept of ordered liberty*' such that '*neither liberty nor justice would exist if* [they] *were sacrificed*' [citations]," or, "[a]nother, broader approach is to define fundamental liberties as those that are '*deeply rooted in this Nation's history and tradition* [citations].'" *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 790-791 (1986) (White, J., joined by Rehnquist, J., dissenting). (Emphasis added.) See *Snyder v. Massachusetts,* 291 U.S. 297, 305 (1934); *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 503 (1977).

The abortion liberty of *Roe* was *not* "implicit in the concept of ordered liberty" wherein there would be neither "liberty" nor "justice" if it were sacrificed since an act long recognized as criminal, unnatural and immoral could not even begin to so qualify; *nor* was it, as shown *infra,* ever rooted in the history and traditions of this Nation.

E. The *Roe* Court Held Unlawfully that the Unborn Were Not Persons under the 14th Amendment. The *Roe* Court erred when it held "that the word

'person,' as used in the Fourteenth Amendment, does not include the unborn" (410 U.S. at 158) (Footnote omitted.).

1. Biological Test of Personhood. Unborn Children meet the "humans, live and have their being" test of personhood under the Equal Protection Clause of the 14th Amendment as established in *Levy v. Louisiana,* 391 U.S. 68, 70 (1968). (Footnote omitted.) This test is one of "biological relationship." *Glona v. Am. Guarantee & Liab. Ins. Co.,* 391 U.S. 73, 75-76 (1968). Personhood under that Clause is also personhood under the Due Process Clause of such Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886).

2. Logic and Traditions Support the Biological Test of Personhood. Logic has it that an individual becomes a person at the beginning of his or her life – at fertilization. This personhood character is rooted in (1) English law, e.g., I Blackstone, *op. cit.,* at 129-130; (2) the U.S. Declaration of Independence (unalienable right to life exists at creation, not at birth); (3) the Preamble to the Constitution (including a purpose to extend the "Blessings of Liberty" not just to the "People" in whose name the Constitution was formulated but to their "Posterity"); and (4) the traditions of this Nation, *infra.*

F. *Roe* and *Doe* Are Void as Violative of 5th Amendment Due Process. *Roe* and *Doe* and the lower courts therein violated 5th Amendment due process as to affected Unborn Children, Abortion "Survivor" Children, and affected Fathers, Husbands and Parents because they were not represented in such courts as they were entitled before they were deprived of their lives, liberties and/or properties, as applicable, therein. All such courts lacked personal jurisdiction over them. Hence, all such decisions are void. See *McArthur v. Scott,* 113 U.S. 340, 391-392, 396-397, 404-405 (1885) (Unborn Children not

in gestation, Executors and Trustees); Rule 19(a), Fed. R. Civ. Proc.

Finally, the holding that the Unborn were not persons under the 14th Amendment violated 5th Amendment due process by discriminating invidiously against them as compared to corporations and nonaborted prematurely born Children who are "persons" under such Amendment. *Santa Clara County v. So. Pac. R. Co.,* 118 U.S. 394 (1886) (Corporations); *Levy v. Louisiana, supra,* 391 U.S. at 70 (Children). This allowed the above deprivations to occur as to affected Unborn Children.

G. *Casey*'s Refusal To Overrule *Roe* or its Essential Holding. In *Casey,* the Court said, in part, that "a decision to overrule should be based on some special reason over and above a belief that a prior case was wrongly decided [citing a dissenting opinion in each of two cases]"; that a "terrible price" would be paid "for overruling [*Roe*]"; and that overruling *Roe*'s essential holding would cause "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law" (505 U.S. at 864, 869).

As shown *infra*, *Roe* and *Doe* were decided wrongly. Substantial special reasons to overrule those cases should have been examined by the Court and factored into its decision-making: (1) Millions of Unborn Children have been and will continue to be killed by abortion in this Nation; (2) abortion has struck and will continue to strike at the sanctity of the affected families, with terrible costs not only in such deaths but in substantial resultant harm to many affected mothers and other family members; and (3) past and continuing deprivation of the reserved constitutional rights of the States to legislate, etc. in this traditional domestic area.

State decisis has diminished force where decisions of this Court are of constitutional character, as here.

II. EVEN IF *ROE* AND *DOE* ARE VALID DECISIONS, THE COURT OF APPEALS ERRED REVERSIBLY IN HOLDING THE ACT FACIALLY UNCONSTITUTIONAL.

Even if *Roe* and *Doe* are valid decisions, the Court of Appeals erred reversibly in holding The Act facially unconstitutional since the bases on which the Court relied are inapplicable:

A. *Roe* is inapplicable to the procedure prohibited by The Act since an analogous provision in Texas statutory law – prohibiting destruction of a Child during parturition of the mother where the Child would otherwise have been born alive – was not "under attack" or considered in *Roe* (410 U.S. at 118). *Roe* dealt with abortion *in utero,* not with the destruction of a partially delivered Unborn Child. See the Congressional Finding at 117 U.S. Stat. 1205, Sec. 2(14)(H).

In addition, *Roe*'s maternal health exception – applicable to governmental regulation or proscription of abortion after viability – is inapplicable to the procedure prohibited by The Act. That procedure is not an abortion *in utero* after viability. See 117 U.S. Stat., Sec. 3, 1206-1207.

B. The *Stenberg* record was irrelevant to this case which, of course, was governed factually by its own record. As shown, *infra,* Congress found that "partial-birth abortion is never medically indicated to preserve the health of the mother" [117 U.S. Stat. 1206, Sec. 2(14)(O)]. As long as this Finding was inferred reasonably from substantial evidence before Congress, it was binding on the Court of

Appeals. See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-196 (1997).

The Court of Appeals erred by failing or refusing to apply such standard and by articulating a new one – that, "to succeed, the government must demonstrate that relevant evidentiary circumstances * * * have in fact changed over time" (413 F. 3d at 802).

Finally, this Court's decision in *Stenberg* was not controlling on the Court of Appeals (nor should it be operative at bar) because (1) the *Stenberg* Court did not consider or rule upon the contentions of *Roe*'s inapplicability, above, and (2) the *Stenberg* record was not applicable to this case.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY APPLYING *ROE V. WADE* AND *STENBERG V. CARHART* TO THIS CASE BECAUSE *ROE* AND ITS COMPANION, *DOE V. BOLTON*, ARE VOID AS VIOLATIVE OF THE U.S. CONSTITUTION

A. Background. 1. The Federal Statute. Section 3 of The Act amends Title 18 of the United States Code by making it a crime for "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus * * *." 117 U.S. Stat. 1206. This subsection, however, "does not apply to a partial-birth abortion that is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Ibid.* Other provisions are included, including a detailed definition of

partial-birth abortion. *Id.* at 1206-1207. The Act does not contain an exception for preservation of maternal health.

2. This Court's Decision in *Stenberg v. Carhart*. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court held unconstitutional Nebraska's statutory ban on partial-birth abortions ("D&X" procedures) because it lacked an exception for preservation of maternal health – an exception which stems from *Roe* and is amplified definitionally in *Doe* – and, because of such deficiency, placed an undue burden on the ability of women to choose abortion. The Court pointed out that the District Court found that "D&X significantly obviates health risks in certain circumstances" (p. 936), and held that "a statute that altogether forbids D&X creates a significant health risk" (p. 938).

3. The Decision of the Court of Appeals at Bar. The Court of Appeals held The Act facially unconstitutional because it lacked an exception for maternal health, basing that upon this Court's conclusion in *Stenberg* "that 'substantial medical authority' supports the medical necessity of a health exception" and the "absence of new evidence which would serve to distinguish this record from the record reviewed by the Supreme Court in *Stenberg*." *Carhart v. Gonzales, supra*, 413 F. 3d at 803.

This was error since, as shown below, *Roe* and *Doe* (with the two cases to be read together, *Roe*, 410 U.S. at 165), are void as violative of the U.S. Constitution and, hence, had no operative effect upon the Court of Appeals herein (or on this Court in *Stenberg*).

4. Presentment of an Opportunity To Reconsider and Overrule *Roe* and *Doe* as Decided Wrongly. Since the instant case involves the application and reach of *Roe* (with its maternal health exception, 410 U.S. at

164-165) and *Doe* (with its broad description of maternal health, 410 U.S. at 192), this Court has an opportunity to reconsider the correctness of those decisions and overrule them if it determines that they were decided wrongly.

For the reasons and authorities presented below, Life Advocates urges the Court (1) to reconsider and overrule those decisions as decided wrongly, see *Brown v. Bd. of Education of Topeka, supra,* 347 U.S. at 493-495; *Erie R. v. Tompkins, supra,* 304 U.S. at 77-80; *Johnson v. Zerbst, supra,* 304 U.S. at 467-468; *Windsor v. McVeigh, supra,* 93 U.S. at 277-279, 283-284; and (2) to rule that Unborn Children are persons within the scope of the Due Process Clause of the 14th Amendment, see *Levy v. Louisana, supra,* 391 U.S. at 70.

B. The Personal Privacy Right Inclusive of the Abortion Decision Is Not a Constitutionally Protected Liberty. In *Roe,* this Court ruled, in (410 U.S. at 153):

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Justice White, in dissent, saw nothing in the language or history of the Constitution to support the Court's judgment, and concluded that it was "an improvident and extravagent exercise of the power of judicial review * * * " (*Roe,* 410 U.S. at 222); and Justice Rehnquist, in dissent, joined by White, J., said, in part, that "[t]o reach its result, the Court necessarily has had to find within the scope of

the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment" (*id.* at 174).

In *Casey,* Justice Scalia, in dissent, joined by three other Justices, said, in part, that a woman's power to abort her unborn child was not a constitutionally protected liberty "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. *Akron II, supra,* at 520 (Scalia, J., concurring)." *Casey,* 505 U.S. at 980 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., concurring in the judgment in part and dissenting in part). (Footnote omitted.)

The unconstitutionality of *Roe* and *Doe* is pervasive:

1. The Constitution, as Written, Does Not Support any Liberty of Abortion. The Constitution, as written, is *silent* as to abortion or of any right to destroy human life. Instead, it *protects* the *lives,* etc. of persons from governmental deprivations without due process of law in the 5th and 14th Amendments.

In addition, one of its purposes is to extend the "Blessings of Liberty" not just to the "People" in whose name it was formulated but to their "Posterity." U.S. Const., Preamble. One such blessing is the right of Unborn Children to continue to live under the protection of antiabortion law beginning with the English common law and later by statutory law. The words of the Constitution "must be interpreted in the light of the common law * * * ." *United States v. Wong Kim Ark,* 169 U.S. 649, 654 (1898), and, by the same token, in light of the will of the people expressed in *congruent* antiabortion statutory law.

The *Roe* Court should have considered these matters of *expressed* value and purpose before fashioning a liberty to destroy unborn human life from a Constitution which is *silent* on the subject, with any doubt as to such a liberty to be resolved in favor of *that which was expressed.* After all, those matters dealt with the very subject before the *Roe* Court – human life.

2. The Traditions of this Nation Concerning Unborn Children Do Not Support any Liberty of Abortion. a. Protection Against Abortion. When the Constitution was adopted in 1789, an Unborn Child whose mother was "quick with child" was protected against abortion in this Nation by the English common law[2] (I Blackstone, *op. cit.,* at 129-130). See I Swift, *A System of the Laws of the State of Connecticut* (1795), pp. 176-178; *Mills v. The Commonwealth,* 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle,* 83 N.C. 544, 545 (S.C.N.C., June Term, 1880). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States,* 195 U.S. 65, 69 (1904). "[I]n the early years of our country's existence, the English common law of abortion was in force in virtually every state * * * ."[3] II *Wharton's Criminal Law*

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[2] Fertilization was not understood until the discovery, in 1827, of the ovum of a dog. Flanagan, *The First Nine Months of Life* (N.Y. 1962), Preface, p. 9.

[3] By the 18th century, 3 offenses related to abortion were recognized: (1) "heinous misdemeanor", etc. if an infant whose mother was "quick with child" was killed in the womb as a result of a potion, etc. [e.g., I Blackstone, *op. cit.,* pp. 129-130]; (2) murder, if the woman who was aborted died from the abortion. *Margaret Tinkler's Case* (Durham, 1781), in I East, *A Treatise of the Pleas of the Crown* (Phil. 1806), pp. 230, 354-356]; and (3) murder or manslaughter, if the child was born alive and died as a result of the abortion [see *Sim's Case,* 75 Eng. Repts.

(Continued on following page)

(14th ed., by Charles E. Torcia) (1979), § 250, p. 415. The common law offense of abortion was recognized in some States *after* enactment of their antiabortion statutes. *Commonwealth v. Kelsea,* 157 A. 42 (Supr. Ct. Pa., 1931); *The People v. Jackson,* 3 Hill 92, 94 (S.C.N.Y., May Term, 1842); *The State v. Reed,* 45 Ark. 333, 334 (S.C. Ark., 1883).

In 1868, when the 14th Amendment was adopted, Unborn Children were protected against abortion by criminal sanction in 36 States and Territories of this Nation. *Roe,* 410 U.S. at 174-176 (Rehnquist, J., joined by White, J., dissenting). This situation persisted up to the time of *Roe* and *Doe* except that a number of states, starting in 1967, began to liberalize their antiabortion laws. *Roe,* 410 U.S. at 118-119 and n. 2.

b. Legal Status and Rights Posture of Unborn Children. The traditions of this Nation recognized also the legal status and rights posture of Unborn Children under tort, property and other law. For example, an Unborn Child is entitled to be represented in judicial proceedings in which he or she is affected [*McArthur v. Scott, supra,* 113 U.S. at 391-392, 395, 404], a right rooted in English law [*Lutterel's Case,* referred to in *Hale v. Hale,* 24 E. Repts. 25 (Ch., 1692)]; and is recognized and entitled to protections against torts in varying circumstances under the prenatal tort injury doctrine [e.g., *Yandell v.*

1075 (Q.B., 1601); IV Blackstone, *op. cit.* (c. 1770), p. 198; *contra,* I Hale, *The History of the Pleas of the Crown* (1st Am. Ed., Phil., 1847), p. 432. Abortion remained a common law offense in England until made a statutory offense with enactment of Lord Ellenborough's Act, 43 Geo. III, c. 58 (1803). III Chitty, *A Practical Treatise on the Crim. Law* (London, 1816), pp. 798-801.

Delgado, 471 S.W.2d 569 (Tex., 1971); 1 Dobbs, *THE LAW OF TORTS* (St. Paul, Minn. 2001), Ch. 18, § 288, "Prenatal Injury."

A pregnant woman may be required to undergo a lifesaving blood transfusion for herself and her Unborn Child [*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, supra,* 201 A. 2d at 538, or a lifesaving cesarean section [*Jefferson v. Griffin Spaulding Co. Hosp. Authority,* 274 S.E.2d 457, 459, 460 (S.C. Ga., 1981)].

A remainder interest in real property could vest in an Unborn Child [*Crisfield v. Storr, supra,* 36 Md. at 146.[4] So too with a beneficial interest under a trust [*Medlock v. Brown,* 136 S.E. 551, 553 (S.C. Ga., 1927)]. In *Brantley v. Boone,* 34 S.W.2d 409, 411 (Tex. Civ. App. – Eastland 1931, no writ), an Unborn Child took an award on the wrongful death of his father.

An Unborn Child is dependent upon his father as well as his mother for support within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea,* 410 F. 2d 56, 61, 62 (5th Cir., 1969)], and, under the "living with" provisions of the Social Security Act, 42 U.S.C. 401 *et seq.,* "is sufficiently 'in being' to be capable of 'living with' the father at the time of his death" [*Wagner v. Finch,* 413 F. 2d 267, 268-269 (5th Cir., 1969)].

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[4] A remainder interest in real property could vest in an unborn child under English law, *Reeve v. Long,* 83 E. Repts. 754 (House of Lords, 1695), and was codified 10 & 11 Wm. III, c. 16 (1699). When feudal tenures were abolished in England (including the incident of Wardship under military tenure), provision was made for the appointment of a testamentary guardian to represent an unborn child and to sue to protect the interests of such child. 12 Ch. II, c. 24, §§ VIII & IX (1660).

These traditions or areas of law, which were recognized and discussed by the *Roe* Court (*Roe*, 410 U.S. at 161-162), do not support the abortion liberty. The abortion liberty fashioned by *Roe* is at war with them and the Constitution. The Court in *Roe* and *Doe* should have considered Justice Harlan's admonition in *Poe v. Ullman, supra*, 367 U.S. at 542, which it quoted approvingly in *Casey*, that "'a decision of this Court which *radically departs from it* [the traditions from which this Nation developed and the traditions from which it broke] *could not long survive, while a decision which builds on what has survived is likely to be sound.*'" *Casey*, 505 U.S. at 850. (Emphasis added.)

3. The Liberty Reach of the 14th Amendment Does Not Support any Liberty of Abortion. The *Roe* Court erred when it fashioned a personal privacy right inclusive of the abortion decision and placed it within the liberty reach of the 14th Amendment since these rulings lacked deductive rationality:

While substantive due process is a broad concept, "reasoned judgment" is required for its application. *Casey*, 505 U.S. at 849. The *Casey* Court quoted with approval the following portion of Justice Harlan's dissenting opinion in *Poe v. Ullman, supra*, 367 U.S. at 542 (505 U.S. at 849-850):

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. *If the supplying of content to this Constitutional concept*

> *has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.* The balance of which I speak is the *balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.* That tradition is a living thing. *A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.* No formula could serve as a substitute, in this area, *for judgment and restraint.* (Emphasis added.)

In an effort to show "reasoned judgment," the *Roe* and *Casey* Courts placed *Roe* in succession to a line of cases, dealing with procreation, marriage, etc. cited in *Roe* and expanded in *Casey*. *Roe,* 410 U.S. at 152-154; *Casey* 505 U.S. at 847-849, 851, 852-853, 857. This, however, results in failure since *none* of those cases dealt with the destruction of human life. *Casey,* 505 U.S. at 951-952 (Rehnquist, C.J., joined by White, J., Scalia, J. and Thomas, J., concurring in the judgment in part and dissenting in part). "The abortion decision must therefore 'be recognized as *sui generis,* different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.' *Thornburgh v. American College of Obstetricians and Gynecologists, supra,* at 792 (White, J., joined by Rehnquist, J., dissenting)." *Id.* at 952.

The *Casey* Court said that "[t]he *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut,* 381 U.S. 479 (1965)" (505 U.S. at 857). There is, however, a stark difference between the *prevention* of the formation of

human life and the *destruction* of that life once formed. Thus, the fashioning of such personal privacy right and the application of 14th Amendment support to it fail at reasoned judgment.[5] See *Casey*, 505 U.S. at 951-952 (Rehnquist, C.J., joined by White, J., Scalia, J., and Thomas, J., concurring in the judgment in part and dissenting in part).

4. The Approaches Taken by this Court for the Recognition of Unenumerated Fundamental Liberties Do Not Support any Liberty of Abortion. The abortion liberty fashioned by *Roe* and amplified in *Doe* contravened the approaches taken by this Court for the recognition of unenumerated fundamental liberties. "One approach has been to limit the class of fundamental liberties to those interests that are *'implicit in the concept of ordered liberty'* such that *'neither liberty nor justice would exist if* [they] *were sacrificed'* [citations],"[6] or "[a]nother, broader approach is to define fundamental liberties as those that are *'deeply rooted in this Nation's history and tradition* [citations]." *Thornburgh v. American College of Obstetricians and Gynecologists, supra*, 476 U.S. at 790-791 (White, J., joined by Rehnquist, J., dissenting). (Emphasis added.) See *Snyder v. Massachusetts, supra*, 291 U.S. at 105; *Moore v. City of East Cleveland, Ohio, supra*, 431 U.S. at 503.

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[5] The assertion in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) – that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (Emphasis in original.) – cannot support the abortion liberty since that case, like *Griswold v. Connecticut*, 381 U.S. 479 (1965), involved contraception.

[6] The quotations are from *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *Palko* was overruled in *Benton v. Maryland*, 395 U.S. 784, 793-796 (1969) to the extent that it conflicted with that decision.

In *Snyder,* this Court said that Massachusetts was "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,*" 291 U.S. at 105. In *Moore,* decided after *Roe* and *Doe,* this Court said that "[o]ur decisions establish that the *Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition,*" 431 U.S. at 503. (Emphasis added. Footnote omitted.)

The abortion liberty of *Roe was not* and *is not* "implicit in the concept of ordered liberty" wherein there would be neither "liberty" nor "justice" if it were sacrificed since an act long recognized as criminal, unnatural and immoral could not even begin to so qualify; *nor* was it, for the same reason, ever rooted in this Nation's "traditions and conscience" or "history and tradition," above. In fact, it *wars against* the "sanctity of the family" since it pits the interests of affected mothers against their own unborn children, and, in many instances, pits such interests against the interests of affected fathers, affected husbands, and, in the case of pregnant daughters, affected parent(s).

5. The *Roe* Court Held Unlawfully that the Unborn Were Not Persons under the 14th Amendment. The *Roe* Court said that "if the suggestion of personhood is established, the appellants' case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment" (410 U.S. at 156-157). It held unlawfully that the Unborn were not persons under the 14th Amendment (*id.* at 161-162).

a. Biological Test of Personhood. In *Levy v. Louisiana, supra,* 391 U.S. 68, this Court ruled that the illegitimate children there involved, including one who was born posthumously, were "humans, live, and have their being" and, hence, were persons under the Equal Protection Clause of the 14th Amendment (p. 70). (Footnote omitted.) Such test is one of "biological relationship." *Glona v. Am. Guarantee & Liab. Ins. Co., supra,* 391 U.S. at 75-56.

The Unborn Child from fertilization forward meets this test since the Child (1) is alive (by virtue of his or her developing stature), (2) is human (by virtue of having human cells, tissue and DNA) and (3) has a "being" or entityship separate and distinct from that of his or her mother. The Unborn Child also has a biological relationship with his or her mother and father. Personhood under the Equal Protection Clause is also personhood under the Due Process Clause of such Amendment. *Yick Wo v. Hopkins, supra,* 118 U.S. at 369.

b. Logic and Traditions Support the Biological Test of Personhood. In addition, logic has it that an individual becomes a person at the beginning of his or her life, namely, at fertilization. A Child that is born is the same entity that existed in gestation, only at a different developmental stage and place of existence. This personhood character is rooted in (1) English law, (2) the U.S. Declaration of Independence, (3) the Preamble to the Constitution and (4) the traditions of the Nation:

(1) English Law. In addressing the "personal security" aspect of a "natural person," William Blackstone said that "THE right of personal security consists in a *person's* legal and uninterrupted enjoyment of *his life,* his limbs, his body, his health, and his reputation"; and that

"LIFE is the immediate gift of God, *a right inherent by nature in every individual*; and it begins in contemplation of law *as soon as an infant is able to stir in the mother's womb* * * * ." I Blackstone, *supra*, at pp. 123, 129-130. In *United States v. Wong Kim Ark, supra,* 169 U.S. at 654, this Court pointed out that various words used in the Constitution, including the 14th Amendment's citizenship, due process and equal protection clauses, were not defined therein, and that "[*i*]*n this, as in other respects, it* [the words in the citizenship clause] *must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution* [citing cases]. *The language of the Constitution* * * * *could not be understood without reference to the common law.* 1 Kent. Com. 336; Bradly, J., in *Moore v. United States,* 91 U.S. 270, 274." (Emphasis added.)

Under Chancery Court decisions, an unborn child was considered in situations there involved a "Person in rerum natura" [*Wallis v. Hodson,* 27 E. Repts. 642, 643-644 (Ch., 1740)]; "in esse, according to the rule of the civil law" [*Millar v. Turner,* 27 E. Repts. 907, 908 (Ch., 1747-1748)]; "living * * * in ventre sa mere" [*Beale v. Beale,* 24 E. Repts. 373 (Ch., 1713)]; and had "an existence in the eye of the law" [*Burdet v. Hopegood,* 24 E. Repts. 484 (Ch., 1718)].

(2) U.S. Declaration of Independence. The U.S. Declaration of Independence of July 4, 1776, makes it clear that the *unalienable* right to life of an individual commences at creation, not at birth. Among the self-evident *"truths"* stated therein were that *"all men are created equal,* that they are *endowed by their Creator* with certain *unalienable Rights,* [and] that among these are *Life,* Liberty and the pursuit of Happiness * * * ." *Id.* (Emphasis added.) These principles constitute the "thought and spirit"

behind the letter of the Constitution, *"and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Gulf, Colo. and Santa Fe R. Co. v. Ellis,* 165 U.S. 150, 160 (1897). (Emphasis added.)

(3) Preamble to the Constitution. Such personhood is supported also by a constitutional purpose to extend the "Blessings of Liberty" not just to the "People" in whose name the Constitution was formulated but to their "Posterity." U.S. Const., Preamble. One such blessing for Unborn Children is the right to continue to live under the protection of applicable antiabortion law, above.

(4) Traditions of this Nation. Finally, such personhood is supported also by the traditions of this Nation in its recognition of the legal status and rights posture of Unborn Children. See pp. 13-15, above, adopted herein. Rights do not exist *in vacuo.* They inhere in individual persons or legally recognized entities. As this Court noted in the year before *Roe* and *Doe*, "Property does not have rights. *People* have rights." *Lynch v. H.F.C.,* 405 U.S. 538, 552 (1972). (Emphasis added.)

6. *Roe* and *Doe* Are Void as Violative of 5th Amendment Due Process. At the threshold, it is clear that if a court in the United States violates the U.S. Constitution in a proceeding before it, it loses jurisdiction to proceed to judgment, and any "judgment" which it might render would be void. *Johnson v. Zerbst, supra,* 304 U.S. at 467-468; *Windsor v. McVeigh, supra,* 93 U.S. at 277-284. In *Roe* and *Doe,* the Court violated 5th Amendment due process as to Unborn Children, Abortion "Survivor" Children, and affected fathers, husbands and parents, none of whom were represented in the judicial proceedings. The lower courts and this Court therein lacked

personal jurisdiction over all such persons or entities and could not bind them constitutionally with such judgments. As a result, all such judgments are void. *Ibid.*

a. Unborn Children. As shown above, pp. 13-15, 19-21, Unborn Children meet the personhood test under the 14th Amendment and, hence, were entitled to the due process protections of the 5th Amendment. Affected Unborn Children were not represented in *Roe* and *Doe* or in the lower courts as they were entitled. See *McArthur v. Scott, supra,* 113 U.S. at 391-392, 404-405. All such Unborn Children were deprived nakedly of their lives, liberties and any properties without 5th Amendment due process. See *ibid*; *Johnson v. Zerbst, supra,* 304 U.S. at 467-468; *Windsor v. McVeigh, supra,* 95 U.S. at 277-279, 283-284.

b. Abortion "Survivor" Children. Abortion "Survivor" Children are Children who have been born or delivered alive *after* abortion procedures, but die because of prematurity, etc. See 126 "Am. J. Obstet. Gynecol.," pp. 83-89 (Sept. 1, 1976), covering the subject under New York's permissive abortion law in existence prior to *Roe.* Occasionally an Abortion "Survivor" Child is murdered outright. See *Showery v. State,* 690 S.W.2d 689, 694, 695-696 (Tex. App. – El Paso 1985, pet. ref.).

These Children, born or delivered alive in this Nation, are, with minor exceptions, U.S. and State Citizens under the Citizenship Clause of the 14th Amendment or under U.S. statutory law, and "persons" under the Due Process Clauses of the 5th and 14th Amendments. They possess a wide array of rights, including the right to continue to live, to support, and to be represented in judicial proceedings in which their rights and interests are affected. See Rule

19(a), Fed. R. Civ. Proc. They were not represented in the lower courts or this Court as they were entitled. Yet these courts allowed unlawfully their lives, liberties and any properties to be destroyed by exercise of the abortion liberty. See *ibid*; *Johnson v. Zerbst, supra,* 304 U.S. at 467-468; *Windsor v. McVeigh, supra,* 95 U.S. at 277-284.

c. Affected Fathers, Husbands and Parents. In *Roe* and *Doe,* fathers, husbands and parents affected personally by the abortion decisions of pregnant mothers, wives and daughters, respectively, were not represented in the lower courts or in this Court as they were entitled. See Rule 19(a), Fed. R. Civ. Proc. Yet this Court allowed unlawfully their rights and interests in affected Unborn Children to be destroyed or denigrated by exercise of the abortion liberty. See *ibid*; *Johnson v. Zerbst, supra,* 308 U.S. at 467-468; *Windsor v. McVeigh, supra,* 93 U.S. at 277-284.

d. Invidious Discrimination Against Unborn Children. With *Roe* and *Doe,* this Court violated 5th Amendment due process by discriminating invidiously against Unborn Children by denying them 14th Amendment personhood but recognizing such personhood in corporations and the nonaborted prematurely born. As a result, Unborn Children were deprived of their lives, liberties and any properties without such due process of law.

(1) Corporations. Corporations, which are *artificial* beings not mentioned in the Constitution, have been considered "persons" under the Due Process and Equal Protection Clauses of the 14th Amendment for almost a century before *Roe* and *Doe,* see *Santa Clara County v. So. Pac. R. Co., supra,* 118 U.S. 394, while *actual* living unborn human beings, recognized in law and possessive of

substantial legally cognizable rights, pp. 13-15, above, are not. Such discrimination is invidious.

(2) Nonaborted Prematurely Born Children. A prematurely born Child of 7 gestational months has 14th Amendment "personhood," while an older and more developed Unborn Child of 8 gestational months does not. This indicates that an individual's "personhood" thereunder commences not at the beginning of his or her human life but at the point of his or her birth. There is, however, no basis in the Constitution for such an arbitrary formulation, particularly where it is common knowledge that the life of a individual human being commences at the beginning of that individual's life – fertilization. See p. 19, *supra*.

C. *Casey*'s Refusal To Overrule *Roe* or its Essential Holding. In *Casey*, the Court said, in part, that "a decision to overrule should be based on some special reason over and above a belief that a prior case was wrongly decided [citing a dissenting opinion in each of two cases]"; that a "terrible price" would be paid "for overruling [*Roe*]"; and that overruling *Roe*'s essential holding would cause "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law" (505 U.S. at 864, 869).

As shown on pp. 10-24, above, *Roe* and *Doe* were decided wrongly. Substantial special reasons to overrule those cases should have been examined by the Court and factored into its decision-making: (1) Millions of Unborn Children have been and will continue to be killed by abortion in this Nation; (2) abortion has struck and will continue to strike at the sanctity of the affected families, with terrible costs not only in deaths of Unborn Children but in substantial resultant harm to many affected

mothers (especially in the area of psychological harm) and other family members; and (3) past and continuing deprivation of the reserved constitutional rights of the States to legislate, etc. in this traditional domestic area.

Stare decisis has diminished force where decisions of this Court are of constitutional character, as here. These decisions are correctable only by action of the Court itself in a case before it or by amending the Constitution which, of course, is a difficult and lengthy process.

This diminished force is especially true where, as here, *Roe* and *Doe* have generated considerable opposition not only on the Court itself but in the Nation as a whole. See, in related vein, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

II. EVEN IF *ROE V. WADE* AND *DOE V. BOLTON* ARE VALID DECISIONS, THE COURT OF APPEALS ERRED REVERSIBLY IN HOLDING THE ACT FACIALLY UNCONSTITUTIONAL

A. Certain Congressional Findings. After extensive hearings and accumulation of evidence, Congress made a number of Findings, including that "partial-birth abortion is *never necessary to preserve the health of a woman, poses serious risks to a woman's health,* and lies outside the standard of medical care, and should, therefore, be banned" (117 U.S. Stat. 1203-1204, Sec. 2(13). (Emphasis added.) See also Findings at 117 U.S. Stat. p. 1202, Sec. 2(5); *id.* at p. 1204, Sec. 2(14)(A)-(B); *id.* at p. 1205, Sec. 2(14)(F); and *id.* at p. 1206, Sec. 2(14)(O).

B. The Court of Appeals Erred Reversibly in Holding The Act Facially Unconstitutional. 1. Inapplicability of *Roe*. In *Roe,* the Court pointed out that "[t]he Texas statutes that *concern us here* are Arts.

1191-1194 and 1196 of the State's Penal Code. These make it a crime to "'*procure an abortion,' as therin defined,* except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'" (*id.* at 117-118 and n. 1). (Emphasis added.) Article 1191 defined "abortion" to mean "that the life of the fetus or embryo shall be destroyed *in the woman's womb* or that a *premature birth thereof be caused.*" *Ibid.* (Emphasis added.)

The Court said that Article 1195 was "not attacked," and quoted it as follows (*id.* at 118 and fn. 1 at 118):

> "Art. 1195. Destroying unborn child
>
> > "Whoever shall *during parturition of the mother* destroy the vitality or life in a child *in the state of being born and before actual birth, which child would otherwise have been born alive,* shall be confined in the penitentiary for life or for not less than five years." (Emphasis added.)

Article 1195 is now Art. 4512.5, *Vernon's Tex. Civ. Stats. Ann.*

Thus, the statutory challenges before the Court involved the proscription of "abortion" *in utero.* They did not involve the destruction of the life of a Child during parturition of the mother per Article 1195; nor did they involve procedures involving induced partial births like that described in The Act. See Congress' related finding at 117 U.S. Stat. 1205, Sec. 2(14)(H). Hence, *Roe* is inapplicable to The Act.

Moreover, *Roe*'s maternal health exception, applicable to regulation or prohibition of abortions after viability (*Roe,* 410 U.S. at 164-165), is inapplicable to the procedure prohibited by The Act. The Act is not addressed to abortions after viability, i.e., to a procedure commenced *in*

utero after viability in order to kill or commence the killing of the Unborn Child. Instead, it prohibits a procedure performed at any time during a pregnancy where childbirth is induced vaginally with the intention to kill the Child *after* his or her partial delivery *outside* of the mother's body. (Sec. 3 of The Act, 117 U.S. Stat. 1206-1207). *Roe*'s maternal health exception does not reach such a procedure.

2. Erroneous Reliance upon this Court's Decision in *Stenberg* and on Parts of the *Stenberg* Record. The Court of Appeals based its holding of unconstitutionality essentially upon (1) certain findings in the *Stenberg* record indicating the need for a maternal health exception, (2) this Court's reliance upon that aspect of the *Stenberg* record, and (3) its claim that the records in this case and in *Stenberg* were "similar in all significant respects," and (4) "[i]n the absence of new evidence which would serve to distinguish this record from the record reviewed by the Supreme Court in *Stenberg*" its belief that it was bound by this Court's conclusion of the need for a health exception in *Stenberg* (413 F. 3d at 801-802, 803). None of these reasons has merit.

a. The *Stenberg* Record. The *Stenberg* record was irrelevant to this case which, of course, was governed factually by its own record. As shown above, Congressional Findings *obviated* the need for a maternal health exception to The Act. So long as these Findings were inferred reasonably from substantial evidence before Congress, they were binding upon the Court of Appeals. See *Turner Broadcasting System, Inc. v. FCC, supra,* 520 U.S. at 195.

Congress found that there existed "substantial record evidence upon which" it reached "its conclusion that a ban

on partial-birth abortion is not required to contain a 'health' exception * * * "; that it "was informed by extensive hearings" in four Congresses; and that "[t]hese findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman * * * ." 117 U.S. Stat. 1203-1204, Sec. 2(13).

The Court of Appeals erred when it failed or refused to apply the *Turner* standard, above, and when it articulated a new standard, i.e., "Rather, to succeed, the government must demonstrate that relevant evidentiary circumstances (such as the presence of a newfound medical consensus or medical studies) have in fact changed over time" (413 F. 3d at 802). The Court's assertion that "[t]here remains no consensus in the medical community as to the safety and medical necessity of the banned procedures" (*id.* at 803) was irrelevant to its appellate function under *Turner,* above.

b. This Court's Holding in *Stenberg*. This Court's decision in *Stenberg* was not and could not be binding on the Court of Appeals for two reasons: (1) The *Stenberg* Court did not consider or rule upon the inapplicability of *Roe,* shown above; and (2) the instant case was to be governed by its own factual record (and legal merits), not that of *Stenberg.*

3. Unlawful Emasculation of Congress' Commerce Clause Jurisdiction. Finally, the Judgment of the Court of Appeals is erroneous because its effect means that Congress lacks the legislative authority to enact a *meaningful* ban on partial-birth abortions in or affecting interstate or foreign commerce.

This stems from the fact that in *Doe v. Bolton, supra,* 410 U.S. 179, maternal health, for a physician's medical judgment, was described very broadly, with the result that the inclusion of a maternal health exception in The Act would render its proscription of partial-birth abortion more form than substance. In *Doe,* this Court agreed with the District Court "that the medical judgment may be exercised in light of *all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All of these factors may relate to health"* (410 U.S. at 192). (Emphasis added.)

While Congress' authority under the Commerce Clause of the Constitution, Art. I, § 8, is plenary, see *Gibbons v. Ogden,* 9 Wheat. (22 U.S.) 1 (1824), there are limits, and legislation in derogation of the Constitution cannot stand. See *United States v. Morrison,* 529 U.S. 598, 617-619 (2000); *United States v. Lopez,* 514 U.S. 549, 567-568 (1995). The Act, however, does not contravene the abortion liberty because, as shown above, (1) *Roe* and *Doe* are void as violative of the Constitution, and (2) in any event, *Roe* does not apply to the procedure prohibited by The Act.

CONCLUSION

For the reasons and authorities set forth above, Life Advocates submits respectfully that the Court should (1) reverse the Judgment of the Court of Appeals and render judgment overruling *Roe v. Wade* and *Doe v. Bolton,* and, in the process, hold that an Unborn Child is a person

under the 14th Amendment's Due Process Clause; or, (2) if the relief in "(1)" is not granted, reverse the Judgment of the Court of Appeals and render judgment holding The Act constitutional; or, (3) if the relief in "(2)" is not granted, reverse such Judgment and remand the cause to the Court of Appeals with instructions that it apply the review standard described in *Turner*, above.

Respectfully submitted,

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